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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 446.

AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, A CORPORATION, PETITIONER,

VS.

EDWIN P. HAWORTH AND CORA M. HAWORTH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

OPINIONS BELOW.

The District Court opinion (R. 81), written by District Judge Merrill E. Otis, was filed August 22, 1935, and is reported in 11 Fed. Supp. 1016. The opinion of the Circuit Court of Appeals (R. 94) and dissenting opinion (R. 99) are reported in 84 F. (2d) 695 and 698, respectively.

JURISDICTION.

The decree below was entered July 27, 1936 (R. 105), affirming the decree of the District Court sustaining a motion to dismiss the bill of complaint and dismissing the cause (R. 85); petition for rehearing was denied August 31, 1936 (R. 105). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935, and writ of certiorari was granted herein November 16, 1936 (R. 107).

QUESTION PRESENTED.

This case involves the scope to be given to the federal Declaratory Judgment Act.

The specific question presented is whether there is an "actual controversy," on which a suit under the Act by a life insurance company against a policyholder may be based, when the policyholder makes a claim to disability benefits consisting of a permanent waiver of premiums and present and future cash payments, without bringing suit, and demands repeatedly that the policies be kept in force by reason of his alleged total disability, whereas the company denies that he is totally disabled and insists the policies are lapsed for nonpayment of premium.

Stated more generally, the question is whether a party to a contract, charged with liability thereunder and harassed with claims considered unjust, may, as in England, obtain a declaration of his nonliability or

privilege (absence of duty), a declaration that the claims are unfounded, and a declaration that, as the petitioner asserts, the contract is no longer in force by reason of defendant's breach and that hence petitioner is free from the obligations claimed against him under the contract.

STATUTE INVOLVED.

The statute involved is the Declaratory Judgment Act, Section 274d of the Judicial Code (49 Stat. 1027, 28 U. S. C. A. 400) which provides that in cases of actual controversy the courts of the United States shall have power, upon appropriate pleading, to declare rights and other legal relations of any interested party petitioning therefor, whether or not further relief is or could be prayed.[1]

---

[1]The full text of the Declaratory Judgment Act is as follows:

(1) In cases of actual controversy except with respect to federal taxes the courts of the United States shall have power upon petition, declaration, complaint or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

STATEMENT OF THE CASE.

The petition for declaratory judgment is somewhat long because of the necessity of setting forth the provisions of the five separate policies involved, but the facts alleged, in so far as petitioner's right to a declaratory judgment is concerned, are few and simple. They are as follows:

At various dates prior to 1930 petitioner issued to respondent, Edwin P. Haworth, five policies of life insurance in the aggregate amount of $40,000.00 (R. 2, 7, 10, 13, 16). Cora M. Haworth was named as beneficiary in these policies and was, therefore, joined as defendant in the suit. Each of these five policies contained a provision for benefits in the event of the permanent total disability of the insured. This benefit in three of the policies consisted of a waiver of premiums, the life insurance remaining in force (R. 11, 14, 17); in one policy, of a waiver of premiums and payment of a monthly income (R. 8); and in the remaining policy, of the payment of the face amount of the policy in twenty annual instalments or the payment of a life annuity to the insured in lieu of the death benefit provided in the policy (R. 3). By the terms of the four policies first mentioned the same benefits are payable at death and the same cash and loan values are available, whether the premiums are paid or are waived on account of disability (Exhibit "B," R. 43; Exhibit "C," R. 53; Exhibit "D," R. 63; Exhibit "E," R. 73).

In 1930 and 1931 the respondent, Edwin P. Haworth, ceased paying premiums on four of these policies and

made claim for total permanent disability benefits thereunder (R. 9, 12, 15, 18, 19, 20). He continued to pay premiums on the remaining policy (the one in which the disability benefit was in lieu of the death benefit) until 1934, after which time he made claim for disability benefits under it (R. 5, 6). He has repeatedly renewed his claim to the disability benefits under the several policies and demanded that they be kept in force by reason of the premium waiver provisions (R. 19, 20). These claims have been presented in the form of affidavits of the respondent, entitled "Claim of Benefit Under Total Disability Provision," accompanied by sworn physician's certificates (R. 21 and Exhibit "F," R. 77). Such claims having been continued up to November 24th, 1934 (R. 20), this suit was filed by petitioner on January 5th, 1935 (R. 1). And even after institution of this suit these claims were reasserted on April 16th, 1935 (R. 20).

Petitioner denied that Edwin P. Haworth was permanently and totally disabled, and denied that he was entitled to the disability benefits described in the policies (R. 6, 10, 13, 16, 19, 20). If, as claimed by petitioner, the policyholder is not disabled, all of the policies have lapsed for nonpayment of premiums (R. 5, 9, 12, 15, 18), four of them have no value (R. 9, 12, 15, 18), and the fifth has a value of only $45.00 extended insurance (R. 6). If the policyholder has been totally and permanently disabled, as claimed by him, the five policies are in full force (R. 6, 10, 13, 15, 19) and petitioner is now obliged to pay to him the accrued instalments of cash disability benefits provided for under two of the policies (R. 6, 10). In that event, said respondent is

further entitled to make claim at any time for the cash surrender values accumulating on said policies by reason of provisions for waiver of premiums, or at his death, Cora M. Haworth, as beneficiary, will be entitled to receive the face of the policies less the loans thereon. If these policies are in force, petitioner is required to carry reserves therefor in excess of $20,000.00, in order to meet its obligations thereunder (R. 23).

Up to the time this suit was brought, on the 5th of January, 1935, neither of the respondents had actually brought any suit to enforce their claims (R. 21). Petitioner, therefore, brought this suit for the purpose of obtaining a decision as to whether Edwin P. Haworth has been permanently and totally disabled as he claims, and as to whether petitioner is entitled to treat the policies as lapsed and to close its files in regard to them, or must continue them as existing obligations and pay to insured the income benefit provided for under two of the policies. Petitioner prayed a declaratory decree that the policies are null and void, except for the $45.00 of extended insurance above mentioned (R. 25).

The District Court opinion held in substance that no "actual controversy" existed because a company against whom a liability was asserted could not maintain a suit for a declaratory judgment in advance of institution of suit by the person who asserts the breach and claims the damage (R. 84); and that there were no "rights" to be declared because the rights referred to in the act are rights of a petitioning party to some sort of "relief" (R. 84).

The Circuit Court of Appeals (Circuit Judges Stone, Woodrough and Thomas, Judge Thomas writing (R. 94-99), Judge Woodrough dissenting) affirmed the decree, holding that the petition failed to state facts disclosing an actual controversy in the constitutional sense because the facts averred did not show that any right of petitioner was presently being invaded or imminently and prejudicially affected by the acts of respondents (R. 99).

Judge Woodrough was of the opinion (R. 99-104), that the threat to the petitioner's right was imminent in the controlling sense that it was practically certain to materialize in action; that there was an alleged determination to hold the petitioner to certain obligations indistinguishable from the alleged determination of the taxing officers to hold the railway company in *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace*, 288 U. S. 249, and that that case was completely controlling (R. 103); he was also of the opinion that a controversy was presented as to whether the legal relation of insured and insurer existed between the parties, together with the attendant rights, duties and privileges pertaining to such relation (R. 102).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In holding that persistent claims of rights to present cash disability benefits and petitioner's denials thereof, do not present an actual controversy.

(2) In holding that persistent demands for maintenance by petitioner of life insurance policies as con-

tinuing obligations and petitioner's denials of its duty to do so, do not present an actual controversy.

(3) In holding that irreparable injury must be shown.

(4) In affirming the judgment of the District Court.

OUTLINE OF ARGUMENT.

I. The federal Declaratory Judgment Act is constitutional.

II. The three elements of jurisdiction required by the Act exist in this case:

A. There is an actual controversy within the meaning of the Declaratory Judgment Act and the federal constitution.

1. The allegations of the petition for declaratory judgment disclose an actual controversy as defined by this Court and other federal courts.

2. The allegations of the petition disclose a situation which would enable the policyholder to maintain an action against the petitioner.

3. A party who would normally be defendant under other forms of procedure may seek a declaration under the Act.

4. The suit is not prematurely brought.

5. The declaration sought will be a final determination of the existing controversy.

B. The allegations of the petition for declaratory judgment disclose rights and other legal relations which are properly the subject of judicial declaration.

C. Petitioner is an interested party.

III. Irreparable injury need not be alleged, but is alleged and exists in this case.

ARGUMENT.

I.

The Declaratory Judgment Act Is Constitutional.

Both of the courts below held the Declaratory Judgment Act constitutional (R. 83 and 95). That it is so appears to be incontrovertibly settled by the cases of *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, and *Nashville, etc. Railway Co.* v. *Wallace*, 288 U. S. 249. Petitioner, therefore, does not extend its argument on this point.

The bringing of this suit does not deprive respondents of a jury trial on the factual issue of total disability of the policyholder. The Act makes express provision for submission of a question of fact to the jury.

II.

The Three Elements of Jurisdiction Required by the Act Exist in This Case.

Section 1 of the Declaratory Judgment Act requires that there be an actual controversy and empowers the courts of the United States in cases of actual controversy to declare rights and other legal relations of any interested party petitioning for such declaration. This part of petitioner's argument will, therefore, be devoted to a showing that in this case an actual controversy exists,

that there are rights and other legal relations which are properly the subject of a declaration, and that petitioner is an interested party. Under the first of these divisions the argument will be subdivided into the five headings hereinabove set out under the "Outline of Argument."

A. THERE IS AN ACTUAL CONTROVERSY WITHIN THE MEANING OF THE DECLARATORY JUDGMENT ACT AND THE FEDERAL CONSTITUTION.

1. The allegations of the petition for declaratory judgment disclose an actual controversy as defined by this Court and other federal courts.

The allegations of the petition show there is a controversy of a definite, specific and substantial character. The claims of the policyholder have been clearly and repeatedly asserted in writing and petitioner's denials of these claims have been equally specific and consistent. The respective rights of the parties depend upon a determination of a single clear-cut issue, namely, whether the disability required by the policy provisions existed at the time payment of premiums ceased. The right of the petitioner to treat the policies as lapsed became complete when premium payments ceased if the requisite disability of the insured did not then exist. On the other hand, the right of the insured to disability benefits and the maintenance of the policies in force during the continuance of disability then became complete if such disability did exist. As has already been stated, a jury verdict may be had on this question of fact in the present proceeding. The controversy is ripe for decision.

This is not an attempt to obtain a decision advising what the law would be on an uncertain or hypothetical

state of facts, as was held to be the case in *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70.

The claims of the insured are not mere expressions of opinion in private conversation, as was the case in *Willing* v. *Chicago Auditorium Association,* 277 U. S. 274, 288, nor indefinite and unspecific as in *New Jersey* v. *Sargent,* 269 U. S. 328. On the contrary, they are couched in formal language, attested before a notary public, and accompanied by a sworn physician's certificate (Exhibit "F," R. 77). At frequent intervals and at least thirteen times, beginning in 1930 (R. 19, 20), these claims have been reasserted in similar form (R. 21).

The present suit is similar in its essential characteristics to the case of *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249. In that case the taxing authorities had evidenced a determination to enforce their demand for the payment of certain taxes. Suit was brought under similar provisions of the declaratory judgment act of the State of Tennessee, claiming that the imposition of the tax violated the federal constitution. After a full review of the authorities, this Court held that suit presented a case or controversy within the provisions of Article III, Section 2 of the constitution. It was held that the constitution does not require that a case or controversy should be presented by traditional forms of procedure invoking only traditional remedies, and it was said in the opinion by Mr. Justice Stone, at page 264:

> "Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough

to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below."

In *Gully* v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 (certiorari denied June 1, 1936), the Circuit Court of Appeals for the Fifth Circuit sustained a decree under the federal Declaratory Judgment Act upon a state of facts similar in all respects to those in the *Wallace Case* except that nonliability for the tax sought to be imposed was claimed under statutory exemptions. In affirming the judgment of the trial court, the court said in the opinion by Hutcheson, Circuit Judge, at page 149:

"We think, too, the court was right in the view it took on final hearing, that the supplementary bill for declaratory judgment was properly brought, and that the case was one for such a judgment. For while it may not be doubted that the Federal Declaratory Judgment Act is a purely remedial statute, and does not purport to, nor does it, add to the content of the jurisdiction of the national courts, it certainly does purport in cases where federal jurisdiction is present, to effect and we think it does, effect thoroughgoing, remedial changes, by adding to the coercive or warlike remedies in those courts by way of prevention and of reparation, the more pacific and more prophylactic one of a declaration of rights. When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached. Borchard's Declaratory Judgments, pp. 619-621; *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S.

249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; *United States* v. *West Virginia,* 295 U. S. 463, 55 S. Ct. 789, 79 L. Ed. 1546; *Mississippi Power & Light Co.* v. *City of Jackson,* (D. C.) 9 F. Supp. 564; *Putnam* v. *Ickes,* 64 App. D. C. 339, 78 F. (2d) 223; *Automotive Equipment* v. *Trico Products Corp.,* (D. C.) 10 F. Supp. 736; *Hary* v. *United Electric Coal Co.,* (D. C.) 8 F. Supp. 655; *Black* v. *Little,* (D. C.) 8 F. Supp. 867; *Ohio Casualty Co.* v. *Plummer,* (D. C. S. D. of Tex.) 13 F. Supp. 169; *American Motorists' Ins. Co.* v. *Central Garage,* 86 N. H. 362, 169 A. 121; *Penn et al.* v. *Glenn,* (D. C.) 10 F. Supp. 483; *Post* v. *Metropolitan Cas. Ins. Co.,* 227 App. Div. 156, 237 N. Y. S. 64, affirmed 254 N. Y. 541, 173 N. E. 857; *Holly Sugar Corp.* v. *Fitzler,* 42 Wyo. 446, 296 P. 206."

In *Travelers Ins. Co.* v. *Helmer,* 15 F. Supp. 355 (D. C. Ga.), the court had before it a bill of complaint seeking a declaratory judgment under the Act as to the status of two policies of life insurance which contained provisions for waiver of premium in event of disability. In that case, as here, the insured claimed that the requisite disability existed and this claim was denied by the insurance company. In upholding the right of the insurance company to obtain a declaratory judgment, it is said in the opinion by Circuit Judge Sibley, at page 356:

> "The issue there is whether the insured ought to pay, and the insurance company is entitled to collect full premiums in order to maintain the policies in being. Both parties are interested in knowing their rights in this respect. The status of these policies is important to both to be determined. The remedy by declaratory judgment seems to be of ideal application to such a case."

In *New York Life Ins. Co.* v. *London*, 15 F. Supp. 586 (D. C. Mass.), the plaintiff brought suit praying for a declaratory judgment under the federal Act to determine a controversy as to the existence of disability of the insured under four policies which provided for payment of monthly disability benefits and waiver of premiums. In that case the insurance company had for a time paid monthly disability benefits but had discontinued payments on account of claimed termination of the disability. In the opinion by District Judge Brewster, it was said at page 589:

> "I am aware that there is language in the Foulke Case that conflicts with these views, and the same court, in *Aetna Life Ins. Co. of Hartford, Conn.*, v. *Haworth*, 11 Fed. Supp. 1016, held that an insurance company, insuring against total disability, could not petition for a declaration as to the rights and obligations of the insurance company under the policy. It is apparent that the court overlooked the fact that if the insured were disabled, as he contended, his claim for disability payments had matured, and also, the further fact that upon the extent of insured's disability depended the rights of the insurance company to premiums.
>
> "The mere fact that the declaration in respect of these rights would also determine the obligations of the plaintiff does not, in my opinion, oust the court of jurisdiction. The case presents all the elements required by the act necessary to confer authority.
>
> "It is my opinion that if the existence of a contract from which spring rights and obligations is in controversy between the parties to it, the court is empowered by the act to declare whether there are any legal relations and what those relations are. Whether the policies of insurance, upon which plain-

tiff asserts rights, are or are not in force must necessarily present a controversy upon which a declaration may properly be sought.

"The suggestion that the controversy is one of fact is not sufficient to defeat the plaintiff's petition. See 49 Harvard Law Review, p. 1351."

That there is here presented a controversy in the constitutional sense is shown as clearly by the reasoning in those cases where a controversy was held not to exist (such as *New Jersey* v. *Sargent*, 269 U. S. 328; *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274; *Muskrat* v. *U. S.*, 219 U. S. 346), as by the cases hereinabove cited in which the existence of a controversy has been upheld.

2. The allegations of the petition disclose a situation which would enable the policyholder to maintain an action against the petitioner.

There can be no question but that the policyholder had a right at the time the case at bar was instituted to bring suit against the petitioner both for accrued disability benefits and to have the policies adjudged to be still in force. The right of a policyholder to maintain a suit in equity to set aside the asserted cancellation of a life insurance policy and to declare it to be in force and effect, is clearly established, *Burnet* v. *Wells*, 289 U. S. 670, 680. In Missouri, the right to such relief has been upheld, *Missouri Cattle Loan Co.* v. *Great Southern Life Ins. Co.*, 330 Mo. 988, 52 S. W. (2d) 1. See, also, *Cohen* v. *New York Life Ins. Co.*, 50 N. Y. 610; *Davis* v. *New York Life Ins. Co.*, 47 F. (2d) 1051, l. c. 1055; 6 Couch Cyc. of Insurance Law, Sec. 1429, and cases cited. In

passing, it might be pointed out that in the *Cohen Case* (which was cited in *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123, 132) the court said that:

> "It is fit and proper that both parties to the contract should know their rights."

It needs no citation of authorities to show that the insured's right to sue for accrued cash disability benefits was also complete at the time the present suit was started.

Since the allegations of the petition disclose a state of facts which, without the slightest doubt, would be held to constitute an actual controversy if the policyholder sued, the question is then presented as to whether it is any the less an actual controversy when brought before the court by the party against whom the claim is asserted. This question almost appears to answer itself, but the next section of this brief will be devoted to a consideration of it.

3. A party who would normally be defendant under other forms of procedure may seek a declaration under the Act.

In the *Wallace Case* the court cites and follows the earlier case of *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123. In that case, a previous suit had been brought by Kansas City, under authority of a provision in the city charter, against Swope and the other property owners affected, to determine the validity of the liens for benefit assessments to be made under an ordinance providing for certain street improvements. In the prior proceeding the liens were held to be valid.

The question for determination was whether this judgment was *res judicata* as a "case" or "controversy" under the constitution. In the opinion by Mr. Justice Stone, the court said, at page 131:

> "Under this procedure, the judgment to be awarded finally determines, subject to appeal, the validity of the ordinance authorizing the improvement, the limits of the benefit district, the method of apportioning benefits, and the validity of the proposed liens. That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. Compare *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 70 L. Ed. 641, 46 Sup. Ct. Rep. 236. *They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city*" (italics ours).

This decision is clearly and directly applicable to the situation in the case at bar. Since the right of the insured to maintain an action against the company is clear, then under the express holding in the *Stcope Case* the issues raised in this petition cannot be deemed any the less a controversy in the constitutional sense, because through a modified procedure the parties are reversed and the same issues are raised and may be finally determined at the behest of the petitioner.

In the cases of *Travelers* v. *Helmer*, 15 F. Supp. 355, and *New York Life Insurance Co.* v. *London*, 15 F. Supp. 586, the similarity of which to the case at bar has already been pointed out, it was held that the insurance

company plaintiffs, who would normally be defendants under other forms of procedure, were entitled to maintain their actions for declaratory judgments.

There are other decisions by the federal district courts holding that suits may be brought under the Act by the party to the controversy who would normally otherwise be the defendant. This right has been upheld in cases brought by an automobile liability insurer to determine liability for claims made against the insured by injured persons, *Ohio Casualty Ins. Co.* v. *Plummer*, 13 F. Supp. 169 (D. C. Tex.), and *Commercial Casualty Co.* v. *Humphrey*, 13 F. Supp. 174 (D. C. Tex.); to determine the plaintiff's rights with respect to obligations asserted against plaintiff by the defendant government officials under the Agricultural Adjustment Act, *Black* v. *Little*, 8 F. Supp. 867 (D. C. Mich.); to determine whether plaintiff was infringing patents as defendant claimed, *Lionel Corp.* v. *De Filippis*, 11 F. Supp. 712 (D. C. N. Y.); *Zenie Bros.* v. *Miskend*, 10 F. Supp. 779 (D. C. N. Y.); to determine whether plaintiff was liable in damages for the discharge of an employe prior to expiration of employment contract, *McKesson & Robbins, Inc.*, v. *Charsky*, 15 F. Supp. 209 (D. C. Col.). The last-cited case was brought under a state act.

Like holdings have been made in numerous cases under state declaratory judgment acts. Such right has been upheld (for example) in cases brought to determine—

Whether a policy of liability insurance was in force as to a particular accident as the insured defendant contended, *American Motorists Ins. Co.* v. *Central Garage*, 86 N. H. 362, 169 Atl. 121; whether plaintiff lessee of

defendant's premises was obligated by the lease to pay that part of defendant's income tax arising from the rental income, as demanded by defendant, *Owen* v. *Fletcher Savings & Trust Bldg. Co.*, 99 Ind. App. 365, 189 N. E. 173; the rights of the parties to a lease under a renewal clause therein, *Pulsifer* v. *Walker*, 85 N. H. 434, 159 Atl. 426; whether certain real estate subdivision restrictions were no longer enforceable as against plaintiff's property, *Hess* v. *Country Club Park*, 213 Cal. 613, 2 Pac. (2d) 782; whether plaintiff was obligated under the terms of a lease as contended by defendant lessor, *Tolle* v. *Struve*, 124 Cal. App. 263, 12 Pac. (2d) 61; insurer's liability to undertake the defense of a damage suit for its insured and to pay damages that might be awarded therein as contended by the insured and persons suing him for injuries, *Utica Mutual Ins. Co.* v. *Glennie*, 132 Misc. Rep. 899, 230 N. Y. Supp. 673; the validity of a lease of property to the plaintiff by a city whose right to make the lease had been questioned by objecting taxpayers, *Woodward* v. *Fox West Coast Theaters*, 36 Ariz. 251, 284 Pac. 350.

Like relief has often been granted in England. A review of authorities so holding is found in the opinion of Lord Justice Pickford in the leading case of *Guaranty Trust Co. of New York* v. *Hannay & Co.*, (C. A.) 2 K. B. 536, 555 (1915). In that case a suit was filed by Guaranty Trust Co. to determine whether it was liable under claim asserted by Hannay & Co. upon which claim a suit had been previously instituted in New York.

This question is exhaustively discussed in Borchard's Declaratory Judgments, page 16 *et seq.*, and page 310.

A state court case which has been frequently cited in this country is *Faulkner* v. *City of Keene*, 85 N. H. 147, 155, 155 Atl. 195, 200, where, in the opinion by Peaslee, C. J., it is said:

> "It was long doubted in England whether the proceeding could be maintained by one seeking a negative decree. But it is now settled that it is available there to one asking that a right asserted against him be declared invalid. *Guaranty Trust Co.* v. *Hannay*, (1915) 2 K. B. 536.
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> * * * * * * * *
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> "Its effect is simply to * * * enable the normal defendant to institute the proceedings. It makes no difference whether the claim be in positive or negative form, or whether it involves issues of fact. If the controversy be one that would be justiciable under the law, provided either party had violated the right claimed by the other, it is justiciable under the act as soon as the essential facts arise. Claim of legal or equitable right on the one hand and its denial on behalf of an adverse interest constitute a cause for proceeding for a declaratory judgment."

In the University of Chicago Law Review for December, 1936, Vol. 4, Number 1, Mr. Edwin Borchard, Professor of Law at Yale University and coauthor of the federal Declaratory Judgment Act, has an article on "Justiciability," in which he comments at some length on the opinions of the courts below in the case at bar. Practically all of this article by Mr. Borchard is germane to the questions involved in the case at bar, and petitioner respectfully directs the attention of the court to the entire article. The following quotations appearing on pages 11 and 12 of the Law Review apply to the

particular point now under discussion. Referring to the instant case, Mr. Borchard says:

> "Judge Otis in the United States District Court concluded, astonishingly, that there was not an 'actual controversy,' and dismissed the petition. * * * The judge seemed not to understand that a party charged may institute an action against the claimant, for a judgment that there is no duty as claimed; and to accommodate his dislike of this supposedly novel form of proceeding, the precedents for which are abundant, he relied on the cliche' that there was 'no actual controversy.'
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> * * * * * * *
>
> "In the Haworth case the company asserted immunity and privilege from the unfounded claims of the insured. Again, the Circuit Court of Appeals, like Judge Otis, were worried by the apparent novelty of a party charged, the obligor, instituting an action against the claimant, the obligee, for a declaration of the invalidity of the claim and of release from the cloud thereby created. It is unfortunate that the court apparently had no time to examine the history of this form of proceeding or to appreciate its English and American antecedents, otherwise they could hardly have reached so intolerable and unsustainable a conclusion, which for want of historical background, had to be clothed in the strange suggestion that the issue presented no 'actual controversy.'"

4. The suit is not prematurely brought.

Petitioner's argument down to this point has attempted to show that the facts alleged in the petition for declaratory judgment disclose an actual controversy as that term has been defined by this Court and other courts, that on the facts alleged the policyholder could without doubt have maintained an action against peti-

tioner, and that there is overwhelming authority both in the decisions of this Court and in many other decisions to show that, under declaratory judgment procedure, the reversal of the positions which the parties would ordinarily occupy is immaterial. Petitioner might here close its argument on the "actual controversy" point. However, respondents have suggested in the courts below, and there is some implication in the opinions below, that an actual controversy does not exist because the petition does not allege that respondents had brought suit to enforce the claims made by the policyholder, or that they were threatening to bring such a suit immediately. Petitioner submits that this argument is unsound.

In the report of the senate committee on the judiciary, accompanying the bill to amend the Judicial Code by adding a new section to be numbered 274D (Report No. 1005, 73d Congress, 2d Session, May 10, 1934; Borchard, Declaratory Judgments, p. 634) it is said:

> "The 1,200 American decisions have established that the proceeding must be adversary, or interested parties must be cited, the issue must be real, the question practical and not academic, and the decision must finally settle and determine the controversy."

In this statement of the elements required for rendering a declaratory judgment, it is not indicated that there must be either a pending suit or a threat of immediate suit by the parties against whom the declaration is sought. If the 1,200 American decisions to which the committee referred had made any such requirement, it is unlikely that the committee would have overlooked it in its statement. The cases do not make such a requirement.

One of the primary purposes of declaratory judgment procedure is to provide means for the prompt settlement of controversies. This objective would not be attained if a party asserting a claim could prevent his adversary from instituting an action by the simple expedient of not stating when he proposed to file suit to enforce the claim asserted.[2]

As was said by the trial court in its opinion in this case (R. 81):

> "The plaintiff desires to have judicially determined now the question whether the insured was wholly and permanently disabled on June 1, 1934. If that question can be decided now and is decided adversely to the insured's contention, the liability of the plaintiff definitely and finally will be limited to the ultimate payment of $45.00. An alternative is that at the death of the insured (and that may be twenty years hence) the beneficiary will sue on the policy."

(In mentioning the date June 1, 1934, the trial judge evidently had in mind only one of the policies. Premium payments on the others had ceased some years earlier.)

If the opposing party were about to institute litigation which would determine the controversy, the necessity for seeking a declaratory judgment would be greatly lessened. Hence, intention of the opposite party to postpone litigation should be an added reason for entertaining jurisdiction under the act rather than a ground for denying relief.

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[2]In Missouri, the statute of limitations as applied to a suit on a life insurance policy is ten (10) years. Liebing v. Mutual Life Insurance Co., 269 Mo. 509, 191 S. W. 250.

Petitioner is entitled to prompt and efficient relief and should not be compelled to wait until such time as its adversaries choose to bring suit. *Bank* v. *Stone*, (C. C. Ky.) 88 F. 383, 391, opinion by Judge Taft with whom sat Mr. Justice Harlan and Judge Lurton; *Mutual Life Insurance Co.* v. *Pearson*, 114 F. 295 (C. C. Mass.); *Lincoln National Life Ins. Co.* v. *Hammer*, 41 F. (2d) 12 (8th C. C. A.).

In this connection the language of the court in the case of *Tolle* v. *Struve*, 124 Cal. App. 263, 12 Pac. (2d) 61, 64, is pertinent. It was there said:

> "It was a defect of the judicial procedure which developed under the common law that the doors of the courts were invitingly opened to a plaintiff whose legal rights had already been violated, but were rigidly closed upon a party who did not wish to violate the rights of another nor to have his own rights violated * * *."

If the contention of the respondents is sound, then an easy way has been found for still keeping the doors of the courts closed to a party who has no cause of action except under the traditional forms recognized by the rules of equity and the common law.

In a leading case, *Petition of Kariher*, 284 Pa. 455, 463, 131 Atl. 265, 268, it was said by Chief Justice Moschzisker that, in order to obtain a declaratory judgment, "no wrong need be immediately threatened."

The repeated, formal assertions of claim by the policyholder in the case at bar are far more conclusive as showing a determination to enforce these claims by court action than would be a mere threat to sue. The

policyholder has ceased the payment of premiums and has staked all of his rights upon the assertion of disability. It is inconceivable that the acts of the policyholder alleged in the petition could be viewed in any other light than as preliminary steps for establishment of his rights and those of the beneficiary by legal action. Litigation is none the less inevitable although deferred for the time being.[3]

Permitting a party against whom a claim is asserted to sue for a declaration of his nonliability, and if such claim is on a written contract, for a declaration that the contract is no longer in force, upon a showing only of the conditions set forth in the Senate report, will not be an undue encouragement to litigation, for the very practical reason that the party against whom the claim is asserted generally has nothing to gain by litigation and everything to lose. He will not start court action unless he is reasonably certain that court action will sooner or later be started against him. Obviously, petitioner in this case would not have started suit if it

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[3]On this point, it is said by Judge Woodrough, in his dissenting opinion (R. 103), 84 F. (2d) 700:

> "Although it is possible that ultimately the company might never be sued on the policies, the threat appears to me none the less imminent because litigation is being deferred during the lifetime of the insured and perhaps may further be deferred into the period of the statute of limitations. But there is a present, clearly defined claim of right on both sides. The threat to the company's right is imminent in the controlling sense that it is practically certain to materialize in action; being deferred in point of time merely, to the detriment and increased vexation of the company. The insured demands present payment of certain sums and makes present demand that certain insurance be maintained. There is an alleged determination to hold the company to certain obligations, indistinguishable from the alleged determination of the taxing officers in Tennessee to hold the railway company as set forth in the Wallace case. That case is completely controlling."

had had any idea that the claims of respondents would be dropped. Petitioner's object in starting suit was to obtain a decision now, during the lifetime of the policy-holder, on a question which it felt would inevitably result in future litigation and on which it felt it was entitled to know where it stood. The conditions stated by the Senate committee as having been established by the 1,200 American decisions have been met in this case. The imposition of additional conditions would tend to surround the application of the act with technicalities and impede the remedial effect which the committee report shows the act was intended to have.

5. A decision in this suit will be a final determination of the controversy.

It needs no argument to show that judgment on the question of disability in the present suit in favor of petitioner would be a final determination of the rights and liabilities of the parties.

Respondents argued in their brief opposing issuance of writ of certiorari that if a declaratory judgment were rendered herein which established the disability of the insured, "he would not be entitled to a present judgment against the insurance company," and that "it would not determine finally his right to a judgment in a future action."

If judgment on the question of disability should be rendered in favor of respondents, the case of *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123, definitely establishes the fact that such judgment would be *res judicata* and would finally determine that the policies

are in full force and effect up to the time suit was brought. On the basis of this finding of disability the policyholder would also be entitled to a judgment for all disability benefits accrued. Under the express provisions of the Act summary relief may be granted against any adverse party, on application and notice, based on the declaratory judgment rendered.

A declaratory judgment in favor of the policyholder would also determine his rights to all the benefits of the disability clause in the future, unless it could be shown that his disability had subsequently terminated or that, after the rendition of such judgment, he had failed to comply with some requirement of the policies necessary to enforce his rights to future benefits. But the fact that rights which might subsequently accrue cannot be determined in this suit is no ground for refusing to determine present rights asserted in the form of a justiciable controversy. Such subsequent rights constitute entirely separate and distinct causes of action. This is the uniform holding of the courts. *Pittsburg C. C. & S. L. Ry. Co.* v. *Keokuk & H. Bridge Co.*, (C. C. A. 7th) 107 F. 781, 787, and cases cited; *Breakwater Co.* v. *Donovan*, (C. C. A. 6th) 218 Fed. 341, 343; *Brooke* v. *Yarbrough*, (C. C. A. 10th), 37 F. (2d) 527, 530.

Furthermore, as to policy No. 425229 (Ex. A, R. 30) the adjudication of disability would be final and could not be again litigated, for this policy provides that upon proof of permanent and total disability a full settlement will be made, which upon the election of the insured will either be upon the basis of annual payments of one-twentieth of the sum insured plus dividend additions, or

an annuity for the lifetime of the insured, upon proof only that at the time of each annuity payment the insured be then living (R. 3).

The cases cited in the brief of respondents above referred to are not in anywise applicable to a situation of this character. They simply lay down the rule that the judgment must finally dispose of the then existing controversy. This is well illustrated by the case of *Lewis* v. *Greene,* L. R. (1905), 2 Ch. Div. 340, chiefly relied on by respondents, in which it was sought to have determined a question of law as to the rights of the plaintiff without a determination of the issues of fact upon which the decision of the case would ultimately turn. That action was not brought under Order XXV, Rule 5, providing for declaratory judgments in general, but was brought under Order LIV-A, which provides solely for the construction of a written instrument.

As further showing that this argument is without merit it is obvious that the present controversy is final and complete for the reason that the insured could at this time upon the basis of the issues raised in this petition, maintain an action in which, upon establishing disability, he could recover final judgment for all monthly disability payments which have now accrued, and an adjudication that these policies are in full force and effect. The fact that the respondents could obtain a final judgment in their favor on the cause of action disclosed in the petition for a declaratory judgment would seem to be conclusive proof that a declaratory judgment rendered under the petition would possess all the essential elements of finality.

This same contention was made by respondents in the Circuit Court of Appeals, but that court was evidently not impressed by the argument for the point is not even referred to in either the majority or minority opinions.

B. THE ALLEGATIONS OF THE PETITION FOR DECLARATORY JUDGMENT DISCLOSE RIGHTS AND OTHER LEGAL RELATIONS WHICH ARE PROPERLY THE SUBJECT OF JUDICIAL DECLARATION.

The petition for declaratory judgment (R. 25) prays for a declaration of the status of the insurance policies, asking that four of the policies be declared to be null and void and that the obligation of the plaintiff upon the fifth policy be declared to consist solely in the duty to pay the sum of $45.00 upon the death of the policyholder. It further asks that the rights and other legal relations of all interested parties be declared, and prays the granting of such further relief as the exigencies of the case may require and as may seem meet and proper to the court.

The right to be free from an unfounded claim, or to know whether a claim is well founded, and the right to treat a contract as ended, may well be considered rights within the meaning of the act. It is said in 54 C. J. 808:

> "A right, in a legal sense, exists when, in consequence of given facts, the law declares that one person is entitled to enforce against another a claim, *or to resist the enforcement of a claim urged by another*" (italics ours).

But the Act does not limit declarations to declarations of rights. It provides for a declaration of "rights

and *other* legal relations." Rights must have been considered legal relations by the Congress, else the word "other" would not have been included. If a right is a legal relation then the corresponding obligation must necessarily be a legal relation. Therefore, whether or not petitioner has rights to be declared, it is entitled to come into court, as it has done, and ask for a declaration as to its obligations.

There is ample authority for the proposition that a declaration of immunity from asserted claims, a declaration that the plaintiff is not obligated as claimed by defendants, is a proper declaration under the act. The report of the Senate committee, to which reference has already been made (Report No. 1005, 73d Congress, 2d Session, May 10, 1934; Borchard, Declaratory Judgments, p. 630), contains the following statement:

> "The limitations and condition upon the rendering of such judgment are well stated in the case of *Braman* v. *Babcock* (98 Conn. 549, 120 Atl. 150, 1923), in which it was held that the Connecticut Act, which closely resembles the proposed federal act, authorizes—'the superior court to render final judgments as to the existence or nonexistence of any right, power, privilege, or immunity, or of any facts upon which the existence or nonexistence of such right, power, privilege, or immunity may depend . . .'"

Clearly the declaration sought in this case comes within the language approved by the Senate committee.

The right to seek a declaration as to nonliability has been recognized by this Court in *Nashville, etc., Ry. Co.* v. *Wallace,* 288 U. S. 249. There, as here, in a proceed-

ing for declaratory judgment the plaintiff was denying and the defendant was asserting a claim and demand against the plaintiff. In this respect, as in others, the *Wallace Case* is, as stated by Judge Woodrough in his dissenting opinion (R. 103), "completely controlling." The same principle was affirmed in *Gully* v. *Interstate Gas Company,* 82 F. (2d) 145.

The same principle has been recognized by the English courts, *Guaranty Trust Co.* v. *Hannay & Co.,* (C. A.) 2 K. B. 536 (1915); *Societe Maritime & Commercial* v. *Venus Steam Shipping Co.,* 9 Comm. Cas. 289 (1904). In each of these leading cases it was held that the plaintiff was entitled to ask for a declaration that it was not obligated as claimed by the defendant.

The same principle is recognized by the leading text-writer on declaratory judgments. In Borchard's Declaratory Judgments, pages 74 *et seq.,* it is shown that a freedom or immunity from claim is embraced in the phrase "rights and other legal relations." We have already quoted in this brief the statement made by Mr. Borchard on page 12 of the Chicago Law Review for December, 1936, in which he calls the conclusion of the Circuit Court of Appeals, that a party charged could not seek a declaration of the invalidity of the claim and of release from the cloud thereby created, intolerable and unsustainable.

However, petitioner's claim that there are rights and other legal relations disclosed by the petition which are properly the subject of a declaration, does not need to be based entirely upon the proposition that immunity from obligation comes within that phrase of the act.

Petitioner is asking for a declaration that certain insurance policies be declared void. The petition alleges (R. 3-10, 19-20) that claim is made under these policies for certain cash benefits as well as the waiver of premiums. If it is determined that the policyholder has been totally disabled as claimed by him, then the relationship of insured and insurer exists between him and petitioner, and the relationship of creditor and debtor also exists because of the obligation which would thus be imposed on petitioner to pay the disability income benefits now due. If a declaration is granted as prayed by petitioner, then neither of these relationships exists between it and the policyholder. It is submitted that these are legal relations even within the definition laid down by the District Court for the Western District of Missouri in the case of *Columbian National Life Insurance Co. v. Foulke,* 13 F. Supp. 350, 352, which court appears to be alone in the narrow interpretation given by it to the phrase "rights and other legal relations."

C. PETITIONER IS AN INTERESTED PARTY.

It is so obvious that petitioner has a direct pecuniary interest in the matters as to which a declaration is sought in this case, that this section of the argument is included more for the sake of symmetry than for the sake of necessity. Petitioner has an interest in knowing whether it is an insurer of the life of Edwin P. Haworth in excess of the forty-five dollars of extended insurance which it admits. It is interested in knowing whether it is a debtor of Edwin P. Haworth to the extent of the accrued income disability benefits claimed by him. It is interested in

knowing whether it can close its claim file and be relieved from the continued expense and annoyance of the repeated claims for disability benefits made as alleged in the petition. It is interested in knowing whether it must continue to keep set aside the reserves stated in the petition (R. 23) to meet the obligation which may exist at the death of Edwin P. Haworth, or whether no such obligation exists and therefore no reserves need be set up to meet it.

In an action brought by the policyholder against the company based upon the facts set out in the petition for declaratory judgment in this case, it could not be questioned that this petitioner was an interested party. Accordingly, under the holding of this court in *Fidelity Bank* v. *Swope*, 274 U. S. 123, and the numerous other cases already cited in this brief to the effect that reversal of the ordinary positions of the parties does not affect jurisdiction under the Act, petitioner is an interested party within the meaning of the Act. An action brought by the policyholder would involve a determination of the same issues, in whole or in part, which petitioner seeks to have determined in this suit. Petitioner's interest in the determination of those issues is the same whether it sues or is sued.

Petitioner is clearly an interested party within the definition formulated by the court in the case of *Patterson's Executor* v. *Patterson*, 144 Va. 113, 120, 131 S. E. 217, 219, where the court said:

> "The act contemplates that the parties to the proceeding shall be adversely interested in the matter as to which the declaratory judgment is sought,

and their relation thereto such that a judgment or decree will operate as *res adjudicata* as to them."

See, also, Borchard's Declaratory Judgments, p. 36.

III.

Irreparable Injury Need Not Be Alleged, But Is Alleged and Exists in This Case.

It is not necessary to the maintenance of a suit for a declaratory judgment that actual or threatened irreparable damage be shown as in the case of a suit for injunction. This was expressly held in *Railway Co.* v. *Wallace* (288 U. S. 249, 264), and *Gully* v. *Interstate Natural Gas Co.* (82 F. (2d) 145, 149), and, in effect, was held in *Fidelity National Bank & Trust Co.* v. *Swope* (274 U. S. 123). Of course, the controversy must involve rights of a substantial nature, either from the standpoint of monetary value, or from the standpoint of those personal prerogatives and immunities which are held to be the traditional subjects of judicial protection or enforcement.

Valuable rights of each party of a type which have been traditionally held proper subjects of judicial determination are involved in this action.

The principle contended for is recognized in the case of *New Jersey* v. *Sargent*, 269 U. S. 328, 339, where, in discussing the question of jurisdiction to determine a controversy, it was said in the opinion by Mr. Justice Van Devanter:

"* * * But whether they are thus invalid cannot be made the subject of judicial inquiry until

they are given or about to be given some practical application and effect. Naturally this will be after they become part of an accepted license, and after some right, privilege, immunity or duty asserted under them becomes the subject of actual controversy."

Rights, privileges, immunities and duties of a definite and specific character are, in this case, asserted by the respective parties.

It is true that in the *Sargent Case,* in treating of the further subject of the state's rights in submerged lands, it was said that facts must be stated showing that the statute is being, or about to be, applied in a way which does, or will, encroach on, or prejudicially affect the state's rights in the lands. But, it should be borne in mind that this was a suit for an injunction. An injury, or threatened injury, is essential to the maintenance of an injunction suit. But it does not follow, and we do not believe that this Court intended to say, that actual or threatened injury to, or encroachment upon, rights is essential to the existence of a controversy in the constitutional sense in every case. This is clearly demonstrated by the decision in the later case of *Fidelity National Bank* v. *Swope,* 274 U. S. 123, where encroachment upon, or invasion of, rights was neither shown nor threatened. The language used in the *Sargent Case* is appropriate only to actions involving controversies of that type and was used by the Court as showing the necessity for some act which would "serve both to define the controversy and to establish its existence in the

judicial sense" (Cf. *United States* v. *West Virginia*, 295 U. S. 463, 474).

In the *Wallace Case* (288 U. S. 249, 264), it was said:

> "As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked may likewise be dispensed with if, in other respects the controversy presented is, as in this case, real and substantial. Such was the purport and effect of our decision in *Fidelity National Bank & T. Co.* v. *Swope*, 274 U. S. 123, 71 L. Ed. 959, 47 S. Ct. 511, *supra*, where it was held that a final judgment rendered by a state court in an adversary proceeding brought under a state statute to determine the validity of liens about to be imposed for benefits assessed under a city improvement ordinance, presented a case within the appellate jurisdiction of this court. Accordingly, we must consider the constitutional questions raised by the appeal."

It is not necessary to comment on the case of *Fidelity National Bank & Trust Co.* v. *Swope*, inasmuch as the court, in the above quotation, has stated that that decision was to the same effect.

In the *Gully Case*, 82 F. (2d) 145, 149, the same holding is made by the Fifth Circuit Court of Appeals where it is said that the court thought that under the language of the Act:

> * * * "disputants as to whose rights there is actual controversy, may obtain a binding judicial declaration as to them, before damage has actually been suffered, and without having to make the show-

ing of irreparable injury and the law's inadequacy required for the granting of ordinary preventive relief in equity."

In fact, however, the rights of the petitioner are prejudicially affected. The petition alleges that by reason of there being no judicial determination of the rights of the insured, the plaintiff is required annually to set aside substantial reserves for each of the policies in question until it is judicially determined that they have lapsed and are null and void (R. 23, 24). The setting aside of these reserves constitutes more than a bookkeeping entry (R. 103), and we submit that the Court of Appeals was in error in holding that the company's "control over such funds is neither modified nor affected" (R. 98) by the notices served upon petitioner by the respondents.

The status of insurance reserves was considered by this Court in the case of *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 350. In the opinion by Mr. Justice Clarke, it was there said:

> "The term 'reserve' or 'reserves' has a special meaning in the law of insurance. While its scope varies under different laws, in general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside, 'reserved,' as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment."

Again, at page 353, it was said that:

> "* * * such deductions can be restored to income again only where it is clearly shown that subsequent business conditions have released the amount of them *to the free beneficial use of the company in a real, and not in a mere bookkeeping, sense*" (italics ours).

So long as these reserves are required to be set up by the company, they constitute in a very real sense both a segregation of assets and a liability of the company.

The collection of premiums on outstanding life insurance policies is the most vital function involved in the conduct of life insurance. It is only from these premiums, and the interest accruing from their investment, that the business of the company can be carried on and death and disability benefits paid. Hence, not only the company but all of its policyholders are interested in seeing that premiums are promptly collected on all outstanding policies, and that in all cases of defaulted premiums the policies shall be promptly forfeited or cancelled. All matters affecting the rights and interests of the policyholders directly affect the business of the company.

These principles are clearly set forth in the opinion written by Mr. Justice Bradley, in the case of *New York Life Ins. Co.* v. *Statham*, 93 U. S. 24, 29, where it was said:

> "But whilst this is true, it must be conceded that promptness of payment is essential in the busi-

ness of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business."

Again it is said at page 32:

> "The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business."

To remove this burden a suit of this character is particularly appropriate because the beneficiary can thus be made a party and her interests bound by the judgment rendered. The extent to which the beneficiary would be bound by a judgment rendered in a suit which might be brought by the insured alone is at least questionable. *Brown* v. *Pacific Mutual Life Ins. Co.*, 62 F. (2d) 711

(C. C. A. 4th); *New York Life Ins. Co.* v. *Halpern,* (D. C.) 47 F. (2d) 935; *Mutual Life Ins. Co.* v. *Strochmann,* (D. C.) 6 F. Supp. 953. It is, therefore, to the interest of all parties that this issue be settled in an authoritative way.

There are other and very definite reasons why a denial of the relief prayed for and the resulting delay in the determination of this controversy would be injurious to petitioner. By Section 5929, Rev. Stat. Missouri, 1929, an insurer may be subjected to a penalty of 10% of the claim and the payment of opposing party's attorney's fee for vexatious delay in claimed payment. This added liability is ordinarily held to be a question for the jury. *Gueringer* v. *Fidelity & Deposit Co.,* 184 S. W. 936. If suit should be brought for accumulated disability benefits and petitioner should be held liable therefor, it would be compelled to pay interest at the rate of 6% per annum from the date that the respective payments were due under the provisions of Section 2839, Rev. Stat. Missouri, 1929. If petitioner is liable for these benefits, it is ready to pay them now and should not incur the added obligation of interest and be exposed to payment of interest and penalties by reason of being given no opportunity to have its liability determined with reasonable promptness.

It is unconscionable that the respondents should have the right to hold this claim "as a menace and threat over the head of the complainant," while in the meantime, evidence may become "lost or unavailable." *Schmidt* v. *West,* 104 F. 272 (C. C. Ind.). Relief in equity has often been granted to avoid postponement of litiga-

tion to a "time when the facts are no longer capable of complete proof or have become involved in the obscurities of time" (Story, Eq. Juris., Sec. 705).

Conclusion.

The scope of the Declaratory Judgment Act will be established by this Court's decision in this case. By that decision it will take its place as an improvement in our judicial procedure for which it was intended, or it will become a mere, unimportant form of relief, available merely in the alternative, to parties already possessed of a traditional remedy. The decisions of this Court in the *Swope* and *Wallace Cases* and of the Fifth Circuit Court of Appeals in the *Gully Case*, are authorities, both in letter and in spirit, for an interpretation of the Act which will permit the accomplishment of its intended purpose to afford a procedure for the prompt and efficient judicial determination of the rights and relations of parties, which are the subject of actual dispute.

We respectfully submit that the decision of the Circuit Court of Appeals should be reversed and the cause remanded for trial.

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